No. 22132

IN THE

United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY,
Appellant,

vs.

CHARLES WALKER and
HARTFORD ACCIDENT AND INDEMNITY
COMPANY, *Appellees.*

Reply Brief of Appellant
FIREMAN'S FUND INSURANCE COMPANY

On Appeal from the United States District Court for the District of Montana

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We shall attempt to keep in mind herein the proper office of the Reply Brief, namely, rebuttal and therefore, and in the interests of simplicity and ease of review of this brief, shall attempt to chronologically answer or comment upon the brief of the appellees in the same order as set out in the appellees' brief.

Commencing on page 3 of the Appellees' brief under the heading "Effect of Trial Judge's Findings and Conclusions" Appellees state in part as follows:

> "It is to be recalled now that District Judge Smith found as a fact that the *policy* was ambiguous, pointing out the conflict of appellate decisions. * * *." (Emphasis supplied).

This quotation is erroneous. What Judge Smith found as a fact (assuming the issue of one of fact and not of law, which assumption is questionable) was that the *policy* was *not* ambiguous but rather arrived at his conclusions solely because of the fact that there was a conflict of decisions in other jurisdiction. It is that latter reasoning which we believe to be an erroneous approach on Judge Smith's part. The only thing that Judge Smith found as a fact was that the policy was not ambiguous and he repeatedly so stated in his findings.

Under this same heading Appellees apparently contend, or at least infer, that once a Federal District Court has made a decision on this specific issue that the Circuit Court is powerless to reverse the same even if the appellate court does not agree. Obviously this is not the law. If further argument on this issue is needed, this court's attention is respectfully invited to the three following Circuit Court cases, cited in the Appellants' original brief, all of which reversed a District Court holding on this precise point. These cases are:

United States Fidelity and Guaranty Co. v. Amer-

ican Fidelity and Casualty Co., 299 F.2d 215 (1962) (7th Circuit);

Lumber Mutual Casualty Ins. Co. of New York v. Stukes, et al, 164 F.2d 571 (1947) (4th Circuit);

American Fidelity and Casualty Co. v. St. Paul-Mercury Indemnity Company, 248 F.2d 509 (1957) (5th Circuit) (This case is generally considered to be the leading case on this point).

Commencing on page 5, of Appellees' brief, they set out certain law under the heading of "Montana Insurance Principles." We have no quarrel with the law therein contained. The only comment we feel is desirable under this heading is the fact that this is actually a controversy between two insurance companies and thus the rule of liberality of construction or of strict construction against the policy writer is not applicable since there is no insured which would be left without coverage, as stated in United States Fidelity and Surety Company v. Western Casualty Company, 408 P.2d 596 (Kan.) (1965):

> "We find no ambiguity in the language used. We should not seek ambiguity where none exists merely for the purpose of invoking the rule of liberal construction.
>
> "*In a case involving a dispute between two insurance companies we do not have occasion to apply the rule of liberal or extended interpretation which is sometimes necessary to protect a*

> *layman in the coverage which he thought he was receiving.*" (Emphasis supplied).

And as stated in the Montana statutory Maxims of Jurisprudence, Sec. 49-102, R.C.M. 1947:

> "49-102. (8739) When the reason of a rule ceases, so should the rule itself."

Appellees appear to place great weight on the personal opinion of Norman E. Risjord particularly in reference to an article appearing in 29 Insurance Counsel Journal starting at page 197 (April, 1962). It would thus behoove us to inquire as to the nature of this article and the identity and background of its author, although we hasten to say that we in no way challenge the sincerity or integrity of that author.

Who is Norman E. Risjord? Mr. Risjord is a Vice-President and General Counsel of Employers Reinsurance Corporation of Kansas City, Missouri. The undersigned was so struck with Mr. Risjord's enthusiasm and perhaps even ferocity in advancing the position that Risjord takes, that a check was made with the office of the Montana Insurance Commissioner to determine, if possible, what kind of insurance that Mr. Risjord's company wrote. He was informed that, in Montana, Employers Reinsurance Corporation was licensed to write directly and does write directly various kinds of liability insurance except AUTOMOBILE LIABILITY INSURANCE and WORKMEN'S

COMPENSATION INSURANCE. Assuming that this company does not write automobile liability insurance in other states also (which the writer does not know and has been unable to ascertain, but which appears to be a fair assumption since it is true in Montana) it is hardly shocking to the undersigned, and we trust to this Court, that Mr. Risjord should take the position that he does since such an interpretation obviously could never be adverse to any of his company's policies. It is felt that the foregoing is all the comment which we wish to offer in reference to this Insurance Counsel Journal article.

Commencing on page 15 of their brief, under the heading, "Distinguishing Appellant's Cases", we are satisfied that this Court will concur with the Appellant in its contention that each one of these cases which were cited by the Appellant unequivocally support the Appellant's position. The purported "Distinguishing" is completely and totally non-existent, with a possible exception of the "severability of interest" clause, which clause will be commented on at greater length hereafter. Again we shall establish that the great majority of cases which involve this specific issue have held that this clause makes no change in nor has any effect upon the involved employee exclusion clause.

On page 23 of their brief, Appellees quote from

Travelers Ins. Co. v. Auto-Owners Ins. Co., 203 N.E. 2d 846 wherein that lower state court (Franklin County, Ohio) stated that the weight of authority was balanced in favor of the position herein taken by the Appellees. This writer is utterly astounded as to why the court so stated. It is further extremely mystifying that that court goes on to state that there are only four states which have held to the contrary. As established in our original brief there appears to be at least 25 various jurisdictions, either State or Federal, which support our position herein. Many courts have expressly recognized that the weight of authority clearly predominates in favor of the Appellant.

In 1960 in Transport Insurance Company v. Standard Oil Company of Texas, 337 S.W.2d 284, at page 288, the court spoke as follows:

> "The exact question involved is one of first impression in this jurisdiction. There is a split of authority in other jurisdictions, but the *weight of authority* is that if the injured party is the employee of any person who is insured under the policy, the employee exclusion is applicable although he may not have been an employee of the person committing the tort. * * *." (Emphasis supplied).

Again in 1960 in Buhonick v. American Fidelity & Casualty Company, 190 F.Supp. 399, at page 401, Federal Court spoke as follows:

> "In spite of the conflict of authorities which exist from other states, I am satisfied that the *weight* and *best reasoned* authorities hold to the view that the exclusion provision applies to employees of an additional assured as well as to those of the named assured." (Emphasis supplied).

And this situation has not changed. In 1965 the Kansas Court in United States Fidelity and Surety Company v. Western Casualty and Surety Company, 408 P.2d 596, at page 598, reiterated the same using the following language:

> "The exact question involved is one of first impression in this jurisdiction. There is divided authority in other jurisdictions *but the great weight of authority* appears to be in harmony with the views expressed herein. * * *." (Emphasis supplied).

It should further be noted that 18 of the 26 cases which we contend support our position herein were decided this decade. In view of the foregoing it appears that this answers the Appellees' question or comment found on page 25 of their brief which reads:

> "We have difficulty comprehending the Appellant's statement that the clear weight of authority and the trend favors the Appellant's position."

We will now concern ourselves with the Appellees' contention to the effect that the addition in 1955 of the "Severability of Interest" clause supports their

position herein. Actually precisely the opposite is tru and again the great weight of authority so holds.

Transport Insurance Co. v. Standard Oil Co. o Texas, 337 S.W.2d 284 (290).

> "We have concluded that the 'severability o interests' clause in the present policy cannot al ter the holdings in the cases relied upon b Transport. * * *.
>
> "In the policy involved here there is no am biguity in the exclusion clauses and no incon sistency is shown between the exclusionar clauses and the 'severability of interests' claus in the policy. The clear and unambiguous term of the policy leads us to hold that no employee c the named insured engaged in the named ir sured's business can recover on the named ir sured's policy against anyone included as an ad ditional insured. * * *."

Hanover Ins. Co., et al., v. The Travelers Indem nity Company, 318 F.2d 306 (1963), at page 311:

> "With the authorities in this array and wit the Texas Supreme Court opinion then availabl the district court in the present case conclude that Judge Weber's decision was not controllin We agree with Judge Harper in this conclusio We suspect that Simpson, despite the absenc there of the severability clause, affords a vali intimation as to what the Missouri courts wi say when the precise question here is eventuall presented to them."

St. Paul Fire and Marine Insurance Company v. Vabash Fire and Casualty Insurance Company, 264 '.Supp. 637 (1967), at page 644:

> "* * * The District Judge held that the presence of the 'severability of interest' clause did not alter the construction of the term 'the insured', and the Eighth Circuit affirmed."

(The court then goes on to rule that the employee xclusion clause was applicable and thus no coverge.)

Kelly v. State Automobile Insurance Association, 88 F.2d 734 (6th Circuit) (1961), at page 738:

> "In our judgment, if it was intended by the severability of interests clause to provide coverage in a case like the present one, the language used was inadequate for that purpose. We can only enforce the policy as it was written."

Ohio Casualty Insurance Company v. United States idelity and Guaranty Company, 223 N.E.2d 851 Ill.) (1967), at page 854:

> "Nor are we persuaded that the 'severability' clause creates any change or ambiguity in the interpretation of the exclusionary clause. There is no evidence as to the purpose of that clause, added in 1955 to standard policies, including that of both Plaintiffs' and Defendant's policies here. The clause was added presumably by the insurance industry and not a particular insurance com-

> pany. If it were intended to avoid the conflict in decisions, it could have been stated in clear language adequate to reconcile or avoid these conflicts. It was not so stated."

Benton v. Canal Insurance Company, 130 S.2d 840 (Miss.) (1961), at page 847:

> "We think there is no ambiguity in the exclusion clauses of the Canal policy. We also think that the addition of the 'severability of interests' clause does not indicate that the drafters of the policy form by the addition of that clause intended that the words 'any employee of the insured', as they appear in the exclusion clauses, should mean 'any employee of the insured against whom liability is sought to be imposed.' We therefore hold, as the Court did in the Transport Insurance Company case, supra, that no employee of the named insured engaged in the named insured's business can recover on the named insured's policy against anyone included as an additional insured."

To the same effect please see State Farm Mutual Auto Ins. Co. v. Employers' Fire Ins. Co., 123 S.E.2d 108 (N.C.) (1961) in which the opinion expressly noted that there was a severability of interest clause and held that the *exclusion* clause was applicable.

On page 27 of the Appellees' Brief, they refer to the Ninth Circuit case of Kaifer v. Georgia Casualty Co., 67 F.2d 309 (1933). While the Appellees make very little comment on the case, apparently inferenti-

ılly recognizing that it is of little or no aid to them, ıevertheless because it is a Ninth Circuit case and)ecause we actually believe that, to the extent is rele-ant at all, it contains some strong dicta in support f our position, we would like to offer tht following omments on the Kaifer case.

This case appears to be the earliest case (being ap-roximately 35 years old) which is cited by any court s even purportedly interpreting or being of any aid n the interpretation of the question involved in the nstant Declaratory Judgment action. It will be noted hat the opinion is very short, cites no authority for ts position, does not interpret policy provisions which re identical to the ones here involved and in some ways are not particularly similar; and THAT THE 'ACT SITUATION THEREIN WAS ENTIRELY)IFFERENT in that the case involved a *fellow em-loyee* or cross-employee situation and not a premises wner.

We first would point out to this Court that, exclus-ve of any and all of the following arguments, the pinion in the Kaifer case indicates that *had* there een workmen's compensation coverage (as is true n the instant case) the result would have been the pposite. In this connection please note the following uotation found on page 310 of the Federal Reporter, ith emphasis supplied by this writer:

> "Literally construed the word 'assured' in this provision [meaning exclusion provision] would mean the named assured and the additional assured Sparks. Concededly plaintiff was not an employee of Columbia and Sparks jointly or of Sparks alone, but was in the sole employment of Columbia.
>
> "The first exclusion clause *clearly* indicates that defendant assumed no liability to indemnify *either* Columbia or *anyone else* against loss arising out of an injury to any of *its* employees, which would be covered by a Workmen's Compensation Law. * * *"

While the opinion is silent on the matter the clear indication is that there was no workmen's compensation coverage involved.

In the Kaifer case the injured party was a fellow employee of the alleged tortfeasor, and both were employees of Columbia Pictures Corporation, the named insured. The injury apparently occurred on Columbia's premises. Thus it is seen the factual situation and the legal relationship involved in the Kaifer case are completely different than the situation here involved.

When the Kaifer case is analyzed it will be seen that actually its only holding (and no amout of arguing can change this) was that under the policy provisions *there involved* the exclusion was held not to apply in the case a *fellow employee* tortfeasor. If

that same Court had, *at that time*, the present policy before it, it would have necessarily held that there was no coverage. In this connection see Fireman's policy —Insuring Agreements—III Definition of Insured, subdivision (c) which states that the coverage here involved does not apply:

> "to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer;"

This is conclusively established by the following language of the Kaifer opinion which reads as follows:

> "If defendant had desired to exclude liability for any injury to any employee of Columbia caused by a fellow employee of Columbia, such exclusion would have been clearly expressed in the policy. * * *"

This limitation on the dicta or holding of the Kaifer case has been recognized in a number of cases. Illustrative of this is the recent Fourth Circuit case, (1966) of Bevans v. Liberty Mutual Insurance Company, 356 F.2d 577 wherein the Court spoke as follows with specific reference to the Kaifer case.

> "As plaintiff correctly points out in his brief, an employer is exposed to two types of injury suits, one being internal from his employees and covered by workmen's compensation or other em-

ployer liability insurance, and the second being external involving third party injuries and protected by general liability insurance. However, plaintiff fails to appreciate that the insurer who is also a party to this contract is likewise exposed to two possible fields of liability in insuring an employer and must compute its premiums accordingly. Were it to be liable in a situation such as that at bar it would have to increase its premiums and thereby require the employer to pay twice for protection against claims of employees; once under his employer liability policy and again under his general liability policy. As a result it became necessary to insert the employee exclusion, clause (d), in the policy in an attempt to divorce employee liability coverage from general public liability insurance. This approach failed, however in some jurisdictions [at this point the opinion cites only the Kaifer case] where the courts held the word 'insured' to include the party calling for insurance protection rather than restricting it to the named insured.

"Other jurisdictions limited the scope of the word 'employee' in the same clause to mean a person in the employ of the particular insured (named or additional) against whom the liability is being asserted and who is the party calling for coverage. *Either way the result was the same.* The insurer was confronted with greater liability than that for which he had contracted. What followed was the insertion of the fellow-employee exception [Para. III (a) (2)] in the omnibus clause so as to express the clear intent of the insurer to divorce completely employer liability

from general liability coverage. (Citing cases)" (Emphasis supplied)

See also Johnson v. Aetna Casualty and Surety Co., 104 F.2d 22, 5 Cir. Ga. 1939 in which the following is found:

> "* * * Appellants rely on Kaifer v. Georgia Casualty Co., 9 Cir., 67 F.2d 309, but the policy there did not have clause (d) [fellow employee exception] just above discussed. That decision is further in opposition to such cases as (citing cases). * * *"

And in Lumber Mutual Casualty Ins. Co. v. Stukes, 164 F.2d 571 the Fourth Circuit expressly recognized this limitation of the holding of the Kaifer case to a fellow employee situation and that the Kaifer holding was instrumental in having the fellow employee exclusion clause added to standard policies. (pages 573 and 574 of the Federal Reporter)

The Johnson case, just quoted from, was later followed by Indemnity Insurance Co. of North America v. Malisfski, 46 F.Suppl. 454 1942, affirmed in 135 F.2d 910 (1943) (4th Cir.) (Md). The following quotation is from the Malisfski case:

> "The case of Kaifer v. Georgia Casualty Co., referred to in the opinion in the Johnson case from which we have just quoted, is relied upon by counsel for Malisfski and the City. But we agree with the manner in which it was distin-

guished in the Johnson case—that is to say, *the limitation clause with which we are here concerned was not in the policy in the Kaifer case.* So we do not think that case is an authority contrary to our conclusions, but *even if it were*, we would not be disposed to follow it, because we believe the reasoning of the Johnson case to be the more sound." (Emphasis supplied)

As a matter of fact it appears that the fellow-employee clause (which is in Fireman's policy) was adopted by the insurance industry as a result of the Kaifer holding. This fact is noted in American Fidelity & Casualty Co., v. St. Paul-Mercury Indemnity Co., supra, on page 517 of 248 F.2d with the following language:

> "Finally, St. Paul unavoidably commits itself to the curious argument that since, to avoid the result of Kaifer v. Georgia Casualty Company (citation) and others like it (*questioned by us* in Johnson v. Aetna Casualty & Surety Co., 5 Cir. 104 F.2d 22) which produced a result so contrary to the purpose of the contract that the standard policy was modified by introducing the cross-employee exception in the Omnibus Clause, * * *" (Emphasis supplied)

And in Associated Indemnity Corporation v. Wachsmith, et al, 99 P.2d 420. (1940) the Washington Supreme Court said:

> "Appellants cite and rely on the case of Kaifer v. Georgia Casualty Co., 9 Cir., 67 F.2d 309. Con-

ceding that the cited case supports the interpretation contended for by appellants herein, we cannot agree with the conclusion reached by the court, nor are we able to follow its reasoning in reaching its conclusion, and we must therefore respectfully decline to follow it."

On page 29 of their brief, Appellees comment on the Montana State District Court decision under the heading of "Montana State District Court Decision". It is at this point in the Appellees' Brief that they have been most unfair and have not correctly represented the issues involved in this Eighth Judicial District case. The Appellees refer to only part of the holding of the District Court case. The Appellees contend or at least infer that the only issue involved was whether or not the loading of the garbage containers with heavy material was within the definition of "loading and unloading" of the involved policy. This is only part of the truth and is grossly misleading to this Court. The Appellant has heretofore filed with this Court, as an exhibit to its Motion for Extension of Time and "Abstention", a complete copy of the Findings of Fact and Conclusions of Law in the State District Court of Traveler's Insurance Company v. American Casualty, et al. Under said paragraph IV, the Honorable Paul G. Hatfield, Judge of the Eighth Judicial District of the State of Montana, made two Findings of Fact which he numbered 1 and 2. We now quote subparagraph number 2 and call the Court's

attention to the fact that it is only subparagraph number 1 to which the Appellees referred to on page 30 of their brief and they pointedly failed to make any reference whatsoever to subparagraph 2. The following is that quotation:

> "2. That said defendant (The Montana Hardware Company) knew, or in exercise of ordinary care should have known, that the said garbage contained was extremely heavy, and knew or should have known that if the weight of the said garbage contained was suddenly deposited or allowed to be assumed by one man, that it would cause bodily injury and harm to any man so handling the same; that despite said knowledge, the defendant carelessly and negligently failed to warn the plaintiff, Bert W. Court, of the nature of the contents of said garbage contained and failed to warn him of the extremely heavy weight contained in the said container.
>
> "* * *
>
> "Any failure to warn said Bert W. Court of the excessive weight of the allegedly offending garbage container would, in the Court's opinion, be an integral part of loading the city garbage truck with the implied permission of the City of Great Falls and if that failure to warn is found by the trier of fact to be either the sole proximate cause, or a concurring proximate cause, of Court's alleged injury and damage, then both the plaintiff's insurance policy and the policy of American Casualty Company would afford con-

current and overlapping coverage were it not for the specific exclusions in the American Casualty policy hereinafter found applicable."

Thus from the aforesaid quotations of Judge Hatfield's Findings it can be instantly seen that this precise issue was before the Montana District Court at that time, was decided by it, and is currently pending on appeal before the Montana Supreme Court, the ultimate forum wherein the issue should be decided. (Appellant's brief has already been filed therein).

Since every presumption is in favor of the District Court's decision it is very strongly and sincerely believed that Montana will join the large majority of jurisdictions which have interpreted this issue in the manner here contended by the Appellant. The writer strongly suspects that the Appellees are extremely apprehensive that the State District Court's holding will be affirmed as is perhaps best indicated by their continual resistance to any abstention on this hearing as evidenced by their brief in opposition to the aforesaid Appellant's Motion for abstention and as is further evidenced by the first paragraph on the top of page 31 of their brief herein.

Finally in this connection we would again emphasize that the amount involved here is Eighteen Thousand One Hundred Dollars ($18,100.00); that the controversy is solely between two insurance com-

panies (the injured party has long been paid); tha each of the two parties to this appeal have "temporar ily" contributed one half of that amount to the settle ment and that consequently the amounts are, relative ly speaking, not a great burden on either company In spite of all this the Appellees continually resis the Appellant's position that the proper forum, name ly the Montana Supreme Court, should be allowed tc decide the issue very shortly.

Respectfully submitted,
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney